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A victory for fairness and common sense

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Analysis

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A Victory for Fairness and Common Sense: *R v Hughes*

In 2006 several new offences were added to the Road Traffic Act 1988, one of which was section 3ZB¹. Headed “Causing death by driving: unlicensed, disqualified or uninsured drivers”, this provides:

A person is guilty of an offence under this section if he *causes the death*² of another person by driving a motor vehicle on a road and, at the time when he is driving, the circumstances are such that he is ... (a) ... driving [without a valid] licence³ ... (b) ... driving while disqualified⁴ ... or (c) ... using a motor vehicle while uninsured⁵ ...

The maximum penalty for this offence is two years’ imprisonment.⁶ In *R v Hughes*⁷ the Supreme Court interpreted this in a way which is fairer to the accused than in previous cases, and in accordance with common sense views of causation. This note describes the previous position and summarises the Supreme Court’s ruling.

A. CASES PRIOR TO *HUGHES*

Both the English Court of Appeal and the Scottish High Court had previously interpreted section 3ZB strictly, such that the prosecution did not require to prove that the accused’s driving was at fault. Thus in *R v Williams*,⁸ in which the accused had been driving whilst uninsured and without a licence, the prosecution accepted that no fault whatsoever attached to his manner of driving. The victim had climbed over the central reservation of a dual carriageway and, without looking, stepped in front of the accused’s car. According to the Court of Appeal, the meaning to be given to “causes the death” was dependent on Parliament’s intention in enacting section 3ZB. Referring to the interpretation given to this phrase in relation to the offence of

1 Added by the Road Safety Act 2006, s 21(1), in force from 18 August 2008.

2 Emphasis added.

3 Contrary to the Road Traffic Act 1988, s 87(1).

4 *Ibid*, s 103(1)(b).

5 *Ibid*, s 143.

6 Or a fine, or both, see Road Traffic Offenders Act 1988, s 33 and sch 2, para 1.

7 [2013] 1 WLR 2461.

8 [2011] 1 WLR 588.

“causing death by dangerous driving”,⁹ the court noted that driving had been held to be a cause of death in such cases so long as its contribution to the fatality had been “more than negligible or de minimis”.¹⁰ Thus it concluded:¹¹

We do not think that Parliament can have intended any different definition for section 3ZB ... it is difficult to conceive of any other intention of Parliament than that if a person drove unlicensed or uninsured, he would be liable for death that was caused by his driving however much the victim might be at fault; it was therefore sufficient that the cause was not negligible.

It was therefore open to a jury to hold that the mere fact that a vehicle which was involved in a fatality was being driven by the accused when he was uninsured (etc) was a sufficient causal link.

Williams was followed by the Scottish High Court in *Rai v HM Advocate*.¹² The accused was driving on a motorway when he was both disqualified and uninsured, having taken the wheel because the designated driver felt tired. It seems that the victim, who was knocked down and then run over by the accused, had been walking on the carriageway of the motorway. Several other vehicles drove over his body as it lay on the road. Rai was convicted under section 3ZB and sentenced to 12 months’ imprisonment. A commentary on this case suggested that the wording of this section was such that:¹³

the faultless driver who genuinely forgets to re-insure will be caught by the offence and possibly liable to custody, if death is caused by the driving in question. A low speed fatal impact in a case with a child dashing out in front of an uninsured driver will give rise to the expectation of custody in certain quarters, even for a first offender who inadvertently forgot to re-insure. Equally, the disqualified driver, for whom the public will have less sympathy, merely sitting waiting at traffic lights who is himself the subject of a fatal rear end shunt is caught by the offence, simply by being on the road, even if the deceased in the car behind was drunk, driving dangerously, or, in an extreme case, in the act of committing suicide.

B. *R V HUGHES*: COURT OF APPEAL

The English Court of Appeal also followed *Williams* in *R v Hughes*.¹⁴ The accused was involved in a collision with a car being driven by a Mr Dickinson, as a result of which the latter was fatally injured. On the day of the collision, the deceased had completed eight consecutive 12-hour night shifts and had driven 200 miles. He had also taken heroin shortly before the accident and had methadone and benzodiazepine in his system; according to a toxicologist, such drugs cause “drowsiness, inability to

9 Road Traffic Act 1988 s 1.

10 *R v Williams* [2011] 1 WLR 588 at para 33 per Thomas LJ, referring to *R v Hennigan* [1971] 3 All ER 133.

11 *Williams* at paras 33-34.

12 [2011] HCJAC 105, [2012] SCL 283.

13 *Rai v HM Advocate* [2012] SCL 283 at 290.

14 [2011] EWCA Crim 1508.

concentrate and a lack of co-ordination.”¹⁵ A witness who had been driving behind Mr Dickinson testified that the latter had been “weaving from side to the road, crossing the white lines at the nearside . . . , and crossing the central white lines by about 1 foot . . . for 2 miles immediately prior to the collision.”¹⁶

The Recorder who heard the case at first instance rejected the prosecution’s argument that the accused could be found to have caused Mr Dickinson’s death “simply by being on that part of the road when the deceased—whilst under the influence of drugs—drove on to the wrong side of the road and into collision with the defendant.”¹⁷ He stated:¹⁸

I cannot accept that the English language can be so contorted to give such a meaning to the word ‘cause’. The Oxford English Dictionary defines the transitive verb ‘to cause’ as ‘to be the cause of; to effect, bring about, produce, induce, make.’ In my judgment that requires some activity, not passivity, on the part of the person said to be doing the causing.

The Court of Appeal accepted that “There is no dispute that the [accused’s] manner of driving was *faultless* and the death had *nothing at all* to do with the manner of his driving.”¹⁹ Nevertheless, it interpreted section 3ZB to require conviction.

The only purpose of such an approach is one of general deterrence; indeed, the court in *Williams* referred to the offence as “a harsh and punitive measure with an evident deterrent element”.²⁰ Parliament’s rationale, therefore, was that individuals would be less likely to drive whilst uninsured, unlicensed or disqualified because of the possibility of imprisonment should a death occur whilst they are doing so. In practice, it criminalises the accused twice for one blameworthy action. Unsurprisingly, there has been criticism of the decision, since it raises issues of fair labelling and the attribution of blame.²¹

C. *R V HUGHES*: THE SUPREME COURT

At issue in the Supreme Court was whether *Hughes* (and indeed, *Williams*) had been correctly decided. As Lords Hughes and Toulson noted, refusing the appeal would mean “that Mr Hughes is held criminally responsible for the death of Mr Dickinson although on a common sense view Mr Dickinson was entirely responsible for the

¹⁵ Para 15 per Hooper LJ.

¹⁶ Para 16.

¹⁷ Quoted at para 28.

¹⁸ *Ibid*.

¹⁹ Para 10, emphases added. The Court also noted that had the case been a civil suit, it would have been determined that the victim was “100% responsible” for causing the accident, and the driver “not in any way at fault for the death” (para 22).

²⁰ *Williams* at para 34.

²¹ See P W Ferguson, “Road traffic law reform” (2007) SLT 27 at 30; D Ormerod, *Smith and Hogan’s Criminal Law*, 12th edn (2008) 1111-1112; M Hirst, “Causing death by driving and other offences: a question of balance” [2008] Crim LR 339; A P Simester and G R Sullivan, “Being there” (2012) CLJ 29; G R Sullivan and A P Simester, “Causation without limits: causing death while driving without a licence, while disqualified, or without insurance” [2012] Crim LR 753.

collision which resulted in his immediate death.”²² Although the Court of Appeal had found the wording of section 3ZB to be perfectly clear, and admitting of only one interpretation, the Supreme Court took the view that the provision was ambiguous. Their Lordships noted:²³

It would plainly have been possible for Parliament to legislate in terms which left it beyond doubt that a driver was made guilty of causing death whenever a car which he was driving was involved in a fatal accident, if he were at the time uninsured, disqualified or unlicensed.

Furthermore:²⁴

if unequivocal language ... had been used, it would have been beyond doubt that the new offence was committed simply as a result of the defendant being in a situation, viz a fatal accident, whether caused by his driving or not, when committing one of the three specified offences. If such had been the intention of Parliament, it was very easy of achievement. Parliament did not, however, adopt language of this kind.

The court emphasised the serious nature of the offence,²⁵ referring to it as a penal provision “of very considerable severity”. It continued:²⁶

The offence created is a form of homicide. To label a person a criminal killer of another is of the greatest gravity. The defendant is at risk of imprisonment for a substantial term. Even if, at least in a case of inadvertent lack of insurance or venial lack of licence, a sentence of imprisonment were not to follow, the defendant would be left with a lifelong conviction for homicide ... to carry the stigma of criminal conviction for killing someone else, perhaps a close relative, perhaps ... an innocent child, is no small thing.

The offence should be interpreted in a manner favourable to the accused, since it had to be assumed that Parliament did not intend to create a harsh offence unless there was no other way of interpreting a provision. The principle of legality meant that fundamental rights could not be overridden by “general or ambiguous words”.²⁷ It might be suggested that since imprisonment was a potential penalty – and had been the sentence in *Hughes* – the case did involve a fundamental human right, namely the right to liberty, safeguarded by article 5 of the European Convention on Human Rights. The Court did not regard the case as involving human rights, but nevertheless found that unambiguous words were needed if Parliament did in fact intend to hold that an offence was committed under section 3ZB even where the accused’s driving had not been at fault. Given the section’s ambiguity, juries ought to be directed that an accused could only be convicted if there was “something open to proper criticism”²⁸ or “some act or omission ... some element of fault”²⁹ in the driving, and this had to

²² [2013] 1 WLR 2461 at para 6.

²³ *Ibid.*, at para 19.

²⁴ Paras 19–20.

²⁵ Para 26.

²⁶ *Ibid.*

²⁷ Para 27, quoting Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115 at 131E.

²⁸ Para 33.

²⁹ Para 36.

be something other than the mere presence of his vehicle on the road at the time of the fatality.

D. CONCLUSION

It is, of course, open to the Westminster Parliament (road traffic being a reserved matter)³⁰ to amend section 3ZB in a manner that leaves no doubt that it is indeed intended to hold an uninsured (etc) driver criminally liable for causing death, without proof of fault in the manner of the driving. It is to be hoped that Parliament stays its hand. The level of fault required remains unclear, since it may be less than that necessary for the offence of careless or inconsiderate driving.³¹ Repeal of section 3ZB may, therefore, be the better option given that driving whilst uninsured, unlicensed or disqualified is already criminalised in its own right. For the time being at least, the Supreme Court has injected some much needed fairness into the interpretation of this provision.

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Crossing the Rubicon: Closed Hearings in the Supreme Court

*Bank Mellat v Her Majesty's Treasury (No 1)*¹ deals with an eventuality which inevitably follows from the spread of closed material procedures ("CMP"s) since their introduction in the Special Immigration Appeals Commission Act 1997, namely the use of CMP in the Supreme Court. Two questions fell to be decided: was it possible for the Supreme Court to adopt such a procedure? And, if so, was it appropriate for the court to adopt one in this particular case, regarding an application for the court to set aside an order under the Counter-Terrorism Act 2008 (the "2008 Act")? The order in question had prohibited financial institutions from carrying out business with Bank Mellat, an Iranian institution accused of transferring funds for the development of nuclear weapons, effectively preventing it from doing business in the United Kingdom. That these questions fell to be decided in the shadow of the Supreme Court's robust defence of the principle of open justice in *Al Rawi v The Security*

³⁰ Scotland Act 1998, Sch 5 para E1.

³¹ Road Traffic Act 1988 s 3. See *R v Hughes* [2013] 1 WLR 2461 at para 32.

¹ [2013] UKSC 38.